Nos. 82-2129, 82-2149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN RE AIR CRASH DISASTER NEAR
CHICAGO, ILLINOIS ON MAY 25, 1979

SYED HAIDER, as Administrator of the Estate of
VICTORIA CHEN HAIDER, Deceased,
Petitioner in No. 82-2129,

and

INGE MARIA KAHL, Special Administrator of the Estate of
HANS JURGEN KAHL, Deceased, *et al.*,
Petitioners in No. 82-2149,

v.

McDONNELL DOUGLAS CORPORATION and
AMERICAN AIRLINES, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT McDONNELL DOUGLAS CORPORATION IN OPPOSITION

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QUESTIONS PRESENTED

1. In a diversity action brought under Illinois law to recover damages for wrongful death wherein the applicable state substantive law measures the plaintiffs' damages by reference to the contributions the decedent would have made to his dependents had he lived, is it error to admit evidence of the taxes imposed on the decedent's earnings for the purpose of showing the support actually lost by the plaintiffs?

2. In a diversity action brought under Illinois law to recover damages for wrongful death, is it error for the court to instruct the jury that its damages award is not subject to taxation in order to prevent the jury from improperly inflating the award because of the mistaken assumption that the award would be taxable?

PARTIES INVOLVED

McDonnell Douglas Corporation is a publicly held corporation which has no parent company or affiliated companies other than wholly owned subsidiaries.

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STATEMENT OF THE CASE

This brief is filed by respondent McDonnell Douglas Corporation in opposition to the petitions for certiorari separately filed by petitioners Syed Haider, No. 82-2129 ("Haider Petition"), and Inge Maria Kahl, *et al.*, No. 82-2149 ("Kahl Petition").

The statements of the case filed by petitioners Haider and Kahl are substantially accurate insofar as they describe the procedural posture in which these cases arise. It bears emphasis, however, that these cases come to this Court from an interlocutory decision of the Court of Appeals, and that not all of the 150 cases arising out of the May 25, 1979 crash which were consolidated for pretrial proceedings in the District Court are affected by the decision of the Court of Appeals. Many of the consolidated cases have been either settled or else remanded for trial to the transferor courts in which they were originally filed or to which they were removed. Moreover, the compensatory damages recoverable in many of the consolidated cases are governed by the substantive law of a State other than Illinois. The Court of Appeals' ruling affects only those cases governed by Illinois substantive law which remain pending for trial in the Northern District of Illinois—about 27 in all.

REASONS FOR DENYING THE WRIT

Petitioners seek review of a decision rendered in an interlocutory appeal brought under 28 U.S.C. § 1292(b). The Court of Appeals ruled: (1) that "[t]he district court . . . is *free* to give the tax instruction despite contrary state procedure," and (2) that "the district court *may* admit all evidence relevant" to the governing measure of damages established by state substantive law "subject to the considerations of Fed.R.Evid. 403." 701 F.2d at 1200 (emphasis added). No trial has been held. No final judgment has been entered. Thus, there is no record showing how the rulings of the Court of Appeals have been or will be applied in any particular case, or what effect, if any, the rulings might or will have on any future verdict.

Respondent McDonnell Douglas Corporation recognizes that the absence of a final judgment does not preclude review as a jurisdictional matter and would agree that, if the rulings of the Court of Appeals are demonstrably wrong, review should

be had at this time.[1] Respondent respectfully submits, however, that the procedural posture of these cases and the want of a trial record showing how the rulings of the Court of Appeals will be applied on remand may render these petitions an inappropriate vehicle for resolution of any questions of national importance that this Court otherwise might deem worthy of review.

Moreover, the rulings of the Court of Appeals simply do not present the broad *Erie* questions claimed by petitioners. The Court of Appeals' rulings are bottomed on an interpretation of Illinois substantive law that obviates the need to resolve any "*Erie* conundrum." 701 F.2d at 1195. The question whether the Court's interpretation of Illinois law was correct is not worthy of this Court's time and attention. And, not a single judge of the Court of Appeals voted to grant a rehearing *en banc* in response to petitioners' specious assertions that the panel had misinterpreted Illinois law, violated the mandate of *Erie,* and created an inter-Circuit conflict.

I.

THERE IS NO NEED OR REASON TO REVIEW THE RULING THAT THE DISTRICT COURT IS FREE TO ADMIT EVIDENCE OF THE TAXES IMPOSED ON THE DECEDENT'S EARNINGS FOR THE PURPOSE OF SHOWING THE SUPPORT ACTUALLY LOST BY THE PLAINTIFFS.

Petitioners assert that the Court of Appeals erred in concluding that the Illinois courts would admit evidence of the taxes imposed on the decedent's earnings in an action brought

[1] There are 27 cases pending trial in the District Court that are affected by the Court of Appeals' decision. Hopefully, several will be settled now that the Court of Appeals has clarified the propriety of admitting the evidence and giving the instruction at issue. But, it makes little sense to try the cases that cannot be settled if it is clear to this Court that the District Court will be committing reversible error on remand by admitting the evidence or giving the instruction authorized by the Court of Appeals.

under the Illinois Wrongful Death Act, Ill. Rev. Stat. ch. 70, §§ 1, *et seq.* What if that were true? The question whether the Court of Appeals correctly interpreted local law presents no issue of national significance warranting review by this busy Court. *See, e. g., Richards* v. *United States,* 369 U.S. 1, 16 n. 35 (1962); *General Box Co.* v. *United States,* 351 U.S. 159, 165 (1956); *Huddleston* v. *Dwyer,* 322 U.S. 232, 237 (1944). If the Court of Appeals has misconstrued Illinois law, that mistake can be corrected by the Illinois appellate courts in an appropriate case. And, unless the Court of Appeals has erred in interpreting Illinois law, there can be no conflict between the Federal Rules of Evidence and the applicable state substantive law for this Court to resolve or be concerned about.

Despite petitioners' protestations that the Illinois courts certainly would exclude the evidence at issue, the fact of the matter is that no Illinois appellate court has ever squarely addressed the question whether evidence of the taxes imposed on a decedent's earnings is admissible in a wrongful death action brought under Illinois law. Both the District Court and the Court of Appeals recognized as much. *See* 701 F.2d at 1195-98; 526 F.Supp. at 230. The little evidence of Illinois law available, however, suggests that the Court of Appeals was correct in ruling that the Illinois courts would admit the evidence.

The only Illinois appellate judge who has ever squarely addressed the issue concluded that the evidence should be admitted for the very same reasons expressed by the Court of Appeals. *Peluso* v. *Singer General Precision, Inc.*, 47 Ill.App. 3d 842, 856-58, 365 N.E.2d 390, 401-02, 8 Ill.Dec. 152, 163-64 (1st Dist. 1977) (Sullivan, J., concurring). The tax returns of a decedent have been admitted as relevant evidence of the pecuniary loss suffered by the survivors in at least one Illinois wrongful death action in which the returns were proffered by the plaintiff. *Yakstis* v. *Diestelhorst Co.*, 61 Ill.App.3d 833, 839, 378 N.E.2d 591, 596, 19 Ill.Dec. 90, 95 (5th Dist. 1978). And,

the defendant in an Illinois wrongful death action has been permitted to use a decedent's tax returns at least for the purpose of impeaching and/or refreshing the plaintiff's recollection of the decedent's earnings. *Frehill* v. *DeWitt County Service Co.*, 125 Ill.App.2d 306, 320-21, 261 N.E.2d 52, 59 (4th Dist. 1970). Thus, there is no reason to believe that the Court of Appeals was demonstrably wrong in concluding that the Illinois courts would admit this evidence.

More important, petitioners do not, and cannot, contend that the Court of Appeals has misconstrued the applicable measure of damages established by Illinois substantive law. Petitioners complain that their state substantive right of recovery has been impaired by the Court's ruling, but this Court will search their petitions in vain for a description of the governing measure of damages by which their state substantive "right" of recovery is defined *and limited.* The reason for petitioners' silence is understandable. Because the "Illinois substantive measure of damages is identical to the FELA measure," any discussion of the governing measure of damages would wholly undermine the *Erie* justifications petitioners advance for granting review. 701 F.2d at 1195.

As the Court of Appeals observed, it is substantive law, not the rules of evidence, which establish what facts are "of consequence to the determination of the action." Fed. R. Evid. 401. The ultimate fact sought to be proved by use of the evidence at issue is the amount of money the decedent would have contributed to his dependents out of his earnings had he lived. That this fact is material, *i.e.*, "of consequence to the determination of the action," Fed. R. Evid. 401, is well settled by Illinois substantive law. In an Illinois wrongful death action, damages are "primarily measured by the value of the decedent's *contributions* to the family unit," not by the decedent's earnings as such—whether they be calculated on a "gross" or a

"net" basis.[2] *Kaiserman* v. *Bright,* 61 Ill.App.3d 67, 70, 377 N.E.2d 261, 263, 18 Ill.Dec. 108, 110 (1st Dist. 1978) (emphasis added). The "test is a measurement of [what] the decedent might have been expected *to contribute* to the surviving spouse and children had the decedent lived." *Elliott* v. *Willis,* 92 Ill.2d 530, 541, 442 N.E.2d 163, 169, 65 Ill.Dec. 852, 858 (1982) (emphasis added). Simply put, the ultimate measure of damages is lost support.

As this Court observed in *Norfolk & Western Ry. Co.* v. *Liepelt,* 444 U.S. 490, 493-94 (1980), when loss of support is the ultimate measure of damages in a wrongful death action, it "follows inexorably" that the taxes payable on the decedent's earnings "is a relevant factor in calculating the monetary loss suffered by his dependents when he dies" because the decedent obviously cannot contribute to his family what he pays in taxes. The Illinois appellate courts have never held to the contrary.

In view of the legion of Illinois cases which make plain that the applicable measure of damages in an Illinois wrongful death action is the decedent's *contributions* to the family unit rather than his earnings as such, petitioners' reliance on *Hall* v. *Chicago & Northwestern Ry. Co.,* 5 Ill.2d 135, 125 N.E.2d 77 (1955), and *Raines* v. *New York Central Ry. Co.,* 51 Ill.2d 428, 283 N.E.2d 230, *cert. denied,* 409 U.S. 983 (1972), is clearly misplaced. Both *Hall* and *Raines* were personal injury actions involving claims for lost future earnings. In such actions, a different measure of damages governs than in wrongful death actions.

In a personal injury action, the plaintiff's damages are measured by reference to his own earnings, and there is dicta in

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[2] Obviously, however, the decedent's earnings are proper evidence of the plaintiffs' damages, for the size of the decedent's earnings is probative of the amount of contributions the decedent might have made to his dependents had he lived. But the decedent's earnings are only probative *evidence* of, not the *substantive measure* of, the plaintiffs' damages.

Hall v. *Chicago & Northwestern Ry. Co.*, 5 Ill.2d 135, 149-50, 125 N.E.2d 77, 85 (1955), which suggests that the plaintiff's gross earnings may be the proper measure of damages for impairment of earnings capacity in an Illinois personal injury action.[3] In an Illinois wrongful death action, however, the substantive measure of the plaintiffs' damages is not the decedent's earnings, but rather the contributions the decedent would have made to his dependents out of his earnings or other sources. Thus, it does not follow that evidence of the taxes payable on the decedent's earnings would be inadmissible to show the survivors' actual loss of support in an Illinois wrongful death action simply because "gross" rather than "net" earnings may be the governing measure of damages for impairment of earnings capacity in an Illinois personal injury action.

Indeed, the Illinois Pattern Jury Instructions on which petitioners themselves rely show that a great deal of evidence is admissible in a wrongful death action that would never be

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[3] In *Peluso* v. *Singer General Precision, Inc.*, 47 Ill.App.3d 842, 365 N.E.2d 390, 8 Ill.Dec. 152 (1st Dist. 1977), the Illinois Appellate Court described the observations made by the Supreme Court of Illinois on this issue in *Hall* as "dicta" and stated that the admissibility of evidence of the taxes imposed on a decedent's earnings in a wrongful death action was not "strictly controlled" by *Hall*. 47 Ill.App.3d at 853, 365 N.E.2d at 399, 8 Ill.Dec. at 161. Moreover, because *Hall* was an FELA action, it should not be simply assumed that the *Hall* dicta establishes that the Supreme Court of Illinois would adopt "gross" rather than "net" earnings as the proper measure of damages even in a personal injury action brought under Illinois law. The Supreme Court simply observed in *Hall* that the trial court's ruling that "gross" earnings was the proper measure of damages was in accord with the majority rule which, in the absence of contrary guidance from this Court, might then have been presumed to be the rule which this Court would use as the governing *federal* measure of damages even though the Supreme Court of Illinois might have even then preferred a different measure for cases arising under Illinois law. In any event, whether the trial court had erred in using "gross" earnings as the federal measure of damages was not at issue on appeal in *Hall*.

admitted in a personal injury action, such as evidence of the decedent's "customary personal expenses [and other deductions]." IPI Civil No. 31.04, *quoted in* Haider Ptn. p. 11. Evidence of the money that the decedent spent on haircuts, for example, is clearly admissible in a wrongful death action even though the same type of evidence clearly would be inadmissible in a personal injury action brought to recover lost future earnings. This is because the applicable measure of damages which sets the outer boundaries of evidentiary relevance by defining what facts are "of consequence to the determination of the action," Fed. R. Evid. 401, differs. The same analysis applies to the evidence of taxation at issue here. *See Erickson* v. *United States,* 504 F.Supp. 646, 652 (D.S.D. 1980).

No question is presented here as to whether *Liepelt* should be extended to diversity cases based on state law, (Haider Ptn. at 7-8), or whether a federal court is free to disregard the substantive law of a State in a diversity action governed by the mandate of *Erie R.R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), (Kahl Ptn. p. 11). The Court of Appeals did not hold that the measure of damages established by state substantive law was preempted by the federal measure of damages applicable in *Liepelt.* Nor did it ignore the mandate of *Erie* or create any inter-Circuit conflict.[4] The Court simply concluded that, *as a*

[4] Petitioner Kahl claims that the ruling of the Court of Appeals is in conflict with *Vasina* v. *Grumman Corp.,* 644 F.2d 112, 118 (2d Cir. 1981), *Fenasci* v. *Travelers Insurance Corp.,* 642 F.2d 986, 989 (5th Cir.), *cert. denied,* 454 U.S. 1123 (1981), and *Spinosa* v. *International Harvester Co.,* 621 F.2d 1154, 1158-59 (1st Cir. 1980). Kahl Petition p. 6-7. This is not so. The result reached in each case was bottomed on local law. In a diversity action, Rule 401 of the Federal Rules of Evidence *requires* reference to the governing state law to determine the admissibility of evidence because it is the governing substantive law, not the rules of evidence, which defines what facts are "of consequence to the determination of the action." Fed. R. Evid. 401. Thus, by definition, there can be no "conflict" created between state substantive law and the Federal Rules of Evidence in a diversity

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matter of Illinois law, the applicable measure of damages happened to be identical to the federal measure of damages which governed in *Liepelt.* Given the applicable measure of damages set by state law, it inexorably follows that the Court's ruling on the admissibility of the evidence at issue was correct, and that there is no "conflict" between the Federal Rules of Evidence and state substantive law for this Court to resolve or be concerned about.

II.

THERE IS NO NEED OR REASON TO REVIEW THE RULING THAT THE DISTRICT COURT IS FREE TO GIVE THE TAX INSTRUCTION.

The Court of Appeals recognized that it is "very likely" that the Illinois courts "would not instruct the jury that any damages it awarded would be nontaxable." 701 F.2d at 1200. The Court concluded, however, that "the Illinois practice does not bind the federal courts under *Erie* because, so far as we can determine from the cases, Illinois' concerns are either procedural or based on a mistaken view of federal law." *Id.*

Petitioners take issue with the Court's conclusion, but, other than characterizing the instruction as "outcome

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action. That application of the Rules may lead to different results in different cases is no evidence at all of any inter-Circuit conflict.

The Court of Appeals cited each of the cases allegedly in conflict with its decision. 701 F.2d at 1194. Its interpretation of local law obviated the need to resolve any "*Erie* conundrum" and foreclosed the possibility of any true "conflict" with *Vasina, Fenasci* or *Spinosa.* 701 F.2d at 1195. Had the Seventh Circuit panel believed that its decision was in conflict with any decision of another Circuit, the panel would have circulated its opinion to the whole Court prior to publication as required by Seventh Circuit Rule 16(e). *E. g., United States* v. *Ellison,* 557 F.2d 128, 133 n. ** (7th Cir. 1977), *cert. denied,* 434 U.S. 965 (1978).

determinative" (Haider Ptn. p. 20), and the Court's ruling as a threat to "the entire structure upon which the federal court system is based" (Kahl Ptn. p. 10), they make no effort to demonstrate how their state substantive *right* of recovery will in any way be impaired by giving the prophylactic instruction authorized by the Court of Appeals.

Petitioners, as did the District Court, confuse the state substantive right of recovery being enforced with the specific dollar amount of damages that the jury would be inclined to award if the instruction were denied. Petitioners may be correct in arguing that the grant or denial of the instruction will be "outcome determinative" in the sense that it may affect the amount awarded by the jury. If the instruction were denied, it is likely that the jury will *erroneously* compensate petitioners for *non-existent* taxes assumed to be payable on the award, and thus that petitioners' recovery will be *improperly* enlarged, and that *respondents'* state substantive right not to pay out more than petitioners are entitled to receive under the governing state law will be impaired.[5] If the instruction is given, however, there is no risk at all that petitioners' state substantive right of recovery will be improperly diminished in these cases.[6] What

[5] That, of course, is precisely why this Court reversed in *Liepelt*. *See* 444 U.S. at 498. Although a "procedural" matter, the state practice of denying the cautionary instruction had the likely effect of improperly enlarging the federal substantive right of recovery being enforced. Though disagreeing with the Court's judgment as to the substantive effect that denial of the cautionary instruction was likely to have, Justice Blackmun properly recognized that *Liepelt* does not overturn the general rule that the law of the forum governs procedural matters in FELA actions but merely applies an exception. *See id.* at 503-04.

[6] In a personal injury case such as *Hall* in which the plaintiff's own "gross" earnings is the substantive measure of his damages, there is at least a slight risk that the plaintiff's damages might be improperly diminished if an instruction on the nontaxability of the award were

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petitioners claim in the guise of a state substantive "right" is, as the Court of Appeals recognized, nothing more or less than a windfall—a "bonus beyond [the] compensatory damages" to which the plaintiffs are entitled under the governing state substantive law which defines *and limits* their right of recovery. 701 F.2d at 1200.

The *Hall* case on which petitioners rely itself makes plain that the taxation of a judicial award is *not* a proper matter for the jury to take into account in computing the amount of damages to be awarded. 5 Ill.2d at 151-52, 125 N.E.2d at 86, *quoted in* Haider Ptn. p. 16. *Hall* thus teaches that, as the Court of Appeals correctly held, petitioners have no state substantive "right" to recover a windfall, *i.e.*, a verdict *improperly* inflated because the jury erroneously assumes that the award will be taxable.

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given. In *Hall*, the trial court had ruled that the plaintiff's gross earnings, not his after-tax earnings, were the proper measure of his damages. In closing argument defense counsel told the jury that its award—which was to substitute for the future earnings lost by plaintiff—was not taxable and thus effectively invited the jury to mitigate its award for the reason that, though the plaintiff's future earnings would have been taxable had the injury not occurred, the compensation the jury would award as a substitute therefor was not. In *Hall* the Supreme Court of Illinois affirmed the trial court's grant of a new trial because of the impropriety of defense counsel's comments and observed that, in view of the "gross earnings" measure of damages the trial court had ruled applicable, it would be improper for the jury—in response to oral argument or an instruction on the nontaxability of the award—"to mitigate the damages of the plaintiff by reason of the income tax exemption accorded him." 5 Ill.2d at 152, 125 N.E.2d at 36.

Here, however, there is no risk at all of any improper *mitigation* of the damages to which petitioners are entitled as a matter of state substantive law, for the survivors' damages are not measured by the decedent's earnings—whether gross or net—but rather by the contributions that the decedent would have made out of his earnings. See pp. 5-7 & n.3 *supra*.

Unless petitioners are prepared to argue that, as a matter of state substantive law, they are entitled to be compensated for *non-existent* taxes payable on their awards, there is no reason to believe that the propriety of giving the instruction is anything other than a matter of practice and procedure governed solely by federal law. The instruction at issue is nothing more than a cautionary instruction, the purpose of which is "merely [to] eliminate an area of doubt or speculation that might have an *improper* impact on the computation of the amount of damages." *Liepelt,* 444 U.S. at 498 (emphasis added).

As petitioners have no state substantive "right" to a verdict improperly inflated because of the erroneous assumption that the award is taxable, no conflict will be created between federal "procedural" law and state "substantive" law by following the practice dictated by *Liepelt* of instructing the jury that its award will not be taxable in Illinois wrongful death actions tried in federal court.

That the Illinois courts may not choose to follow the same practice is regrettable but immaterial.[7] Even in a diversity action, "state laws cannot alter the essential character or function of a Federal Court" and "state statutes which would interfere with the appropriate performance of that function are not binding upon the Federal court under either the Conformity Act or the 'Rules of Decision' Act." *Herron* v. *Southern Pacific Co.,* 283 U.S. 91, 94 (1931). The question whether to give the cautionary instruction at issue here unquestionably is a

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[7] It is noteworthy that each of the post-*Liepelt* cases brought under state law on which petitioners rely for the proposition that the state courts would not give the instruction authorized by the Court of Appeals were *personal injury* cases, not wrongful death cases. *See* cases discussed in Haider Ptn. pp. 17-19. In only one post-*Liepelt* case involving an Illinois wrongful death claim has the instruction been denied, and the wrongful death claim in that case was tried *along with* personal injury claims. *Newlin* v. *Foresman,* 103 Ill.App. 3d 1038, 1046-47, 432 N.E.2d 319, 325-26, 59 Ill.Dec. 735, 741-42 (3d Dist. 1982). See n. 6 *supra.*

procedural matter involving the allocation of functions between judge and jury in actions tried in federal court. *Cf. Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 537-39 (1958). One of the central functions of a federal court sitting in diversity is to assure that the jury's verdict will not be based on improper considerations. And, the propriety of giving a cautionary instruction that in no way defines, limits or impairs the state substantive right being enforced necessarily must be a matter of practice and procedure governed solely by federal law, for no state law or rule of practice can interfere with the federal court's performance of its duty to assure the integrity of the jury's verdict. *Cf. Womble* v. *J.C. Penney Co.,* 431 F.2d 985, 989 (6th Cir. 1970) (federal, not state, standards control in determining whether improper considerations have impaired the integrity of a jury verdict in a diversity case).

CONCLUSION

Petitioners' assertions that the Court of Appeals has misconstrued Illinois law, violated the mandate of *Erie*, and created an inter-circuit conflict are specious. The petitions for a writ of certiorari should be denied.

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